Office-Supreme Court, U.S.
FILED
MAY 22 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. [redacted] 149

1963

O. C. LEE, Individually, and **J. C. LITSEY**, Individually, and Both as Representatives of Machinists Employed by Louisville & Nashville Railroad Company at Its South Louisville Roundhouse on February 17, 1957, Et Al., Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Et Al., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. _____

O. C. LEE, individually, and J. C. LITSEY, individually, and both as representatives of Machinists employed by Louisville & Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957;

A. B. LEMASTER, individually, and A. P. ROTH, individually, and both as representatives of Electricians employed by Louisville & Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957;

K. L. PUTMAN, individually, and ROY FOWLE, individually, and both as representatives of the Pipefitters employed by Louisville and Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957;

FRANK WELLS, individually, and JOSEPH M. GORDON, individually, and both as representatives of Laborers employed by Louisville & Nashville Railroad Company at its South Louisville Roundhouse on September 17, 1957, - *Petitioners*,

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY;

SYSTEM FEDERATION NO. 91 of the RAILWAY EMPLOYES DEPARTMENT, A.F.L.-C.I.O.:

Continued on Next Page

HERMAN WEBB, President, System Federation No. 91; and

RAY ABNER, Secretary, System Federation No. 91; both as representatives of said System Federation;

INTERNATIONAL ASSOCIATION OF MACHINISTS;

B. B. KIDWELL, General Chairman of said Association, and

JOHN W. HONADEL, President of Local No. 205 of said Association, both as representatives of said Brotherhood;

SHEETMETAL WORKERS' INTERNATIONAL ASSOCIATION;

CLIFFORD MCCUBBIN, President of Local No. 445, of said Association;

EDWARD A. CONNELLY, Local Chairman of Local No. 445, of said Association, both as representatives of said Association;

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;

ERNEST L. RYAN, President of Local Unit No. 1353 of said Brotherhood; and

HERMAN WEBB, General Chairman of said Brotherhood, both as representatives of said Brotherhood;

INTERNATIONAL BROTHERHOOD OF FIREMEN, OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS;

RAY ABNER, General Chairman of said Association, and

HARRY SEARS, individually, President of Local No. 1004, both as representatives of said Association, - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

Your petitioners, O. C. Lee and J. C. Litsey, individually and as representatives of the Machinists employed by respondent Louisville and Nashville Railroad Company at its South Louisville Roundhouse prior to February 18, 1957, A. B. Lemaster and A. P. Roth, individually and representatives of the Electricians employed by said respondent at its South Louisville Roundhouse prior to February 18, 1957, K. L. Putman and Roy Fowle, individually and as representatives of the Pipefitters employed by said respondent at its South Louisville Roundhouse prior to February 18, 1957, and Frank T. Wells and Joseph M. Gordon, individually and as representatives of the Laborers employed by said respondent at its South Louisville Roundhouse, respectfully pray that a Writ of Certiorari issue to review the judgment of the Kentucky Court of Appeals, entered November 2, 1962, which became final February 22, 1963. This judgment affirms a judgment of the Jefferson Circuit Court entered September 12, 1960, as amended October 6, 1960, dismissing for lack of jurisdiction, a Complaint for Declaration of Rights of the petitioners, as representing all sixty-six of the mechanical employees on the South Louisville Roundhouse rosters, under two similar collective bargaining agreements,

OPINIONS OF STATE COURTS.

Petitioners, and the other employees they represent, were, prior to February 17, 1957, employees working in the crafts of machinists, electricians, pipefitters and laborers, for the Respondent, Louisville and Nashville Railroad Company, in the South Louisville Roundhouse area, a separately designated seniority point. The four crafts had bargaining agreements with the Railroad Company through the four respondent International Associations or Brotherhoods, to-wit: International Association of Machinists, Sheet-Metal Workers International Association, International Brotherhood of Electrical Workers and International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

The first three groups, as skilled employees, had contracts as shown by a booklet filed in this action as Exhibit "A" with the Complaint for Declaration of Rights (T. 9). The fourth group had a contract as shown by a booklet filed in this action as Exhibit "B" with said Complaint (T. 9). On the Louisville and Nashville Railroad all four unions operated through a joint union agency, known as System Federation No. 91 of the Railway Employees Department, A.F.L.-C.I.O. a respondent herein.

The two bargaining agreements provided for separate seniority rosters for designated areas including the "South Louisville Roundhouse", an area in the L. & N. yards west of a division fence, established about 1901 and the "South Louisville Shops", an area

east of said fence established about 1908. On February 4, 1957 the Railroad Company posted its Bulletin No. 39 announcing that all mechanical operations of the South Louisville Roundhouse would be discontinued effective February 17, 1957. The bulletin said the employees would be cut off in force reduction. Every employee on the Roundhouse rosters was cut off by this bulletin. Immediately thereafter through posted notices, the same jobs in the same locations were offered to employees on the South Louisville Shops rosters.

There was in fact no reduction in forces whatever, just a shift to different rosters, with all the men on the Roundhouse rosters displaced, and replaced by employees on the South Louisville Shops rosters, as far as the men on said rosters desired the jobs in the Roundhouse area. Men on the Roundhouse rosters were permitted to work in their old area only with seniority from February 18, 1957 or later.

It developed that on January 28, 1957 the representatives of the respondent unions had held a conference with the respondent Railroad Company. The Railroad Company apprised them of its plans for discontinuing use of the Roundhouse rosters and combining the area of that district with the area of the Louisville Shops area. The Unions made no objections, but acceded to this action. However, none of the four International unions conferred with, or received any approval from, or even notified, the employees on the Roundhouse rosters before the bulletins were posted, cutting off all employees on these rosters.

In this action, petitioners are asking, for themselves and the rest of the sixty-six employees on the Roundhouse rosters, a Declaration of Rights in a controversy with the Louisville and Nashville Railroad Company and with the four International Associations or Brotherhoods and their joint agency, System 91, under said collective bargaining agreements. The only claims made herein by the 66 men on the Roundhouse rosters, are the specific contract rights to seniority, of the men on all the Roundhouse rosters, in the mechanical jobs in the Roundhouse area only. Petitioners needed this declaration on February 18, 1957. They need it now. The discrimination has continued. Both the Railroad Company and the unions have been, and are, actively resisting any declaration of rights, by motions to dismiss for lack of jurisdiction.

These motions were sustained by the Chancellor of the Jefferson Circuit Court in an opinion dated August 25, 1960.

A copy of said Opinion is included in Appendix A to this Petition as Item No. 1. The Judgment entered on September 12, 1960, pursuant to that Opinion, is included in Appendix A as Item No. 2. A copy of the Amended Judgment entered October 6, 1960 is included in said Appendix A as Item 3. This amendment shows financial losses of employees on Roundhouse rosters up to that date from lay-offs due to loss of seniority rights.

The decision of the Jefferson Circuit Court was affirmed by the Kentucky Court of Appeals in an

Opinion rendered November 2, 1962. A copy of this Opinion is included in Appendix A as Item No. 4. The Opinion did not become effective until February 22, 1963, when the Kentucky Court of Appeals overruled the petition for rehearing. A copy of the Order Overruling said Petition for Rehearing is included in Appendix A as Item No. 5.

Neither the Opinion of the Chancellor nor the Opinion of the Court of Appeals of Kentucky has been published. Both Opinions refer to a decision by the National Railroad Adjustment Board entered June 30, 1958. A copy of said decision, or "Award" as it is called, is included in Appendix A as Item No. 6. Said Decision is published in Awards of the Second Division of the National Railroad Adjustment Board, Volume 27, pages 643-658.

JURISDICTION.

The Opinion and judgment of the Court of Appeals of Kentucky were entered November 2, 1962. The time for filing the Petition for Rehearing and the time for filing Responses were both extended. Both were filed within the extended periods. An Order was entered February 22, 1963 overruling the Petition for Rehearing. The Opinion and judgment, previously entered by the Court of Appeals, became effective then.

The jurisdiction of this Court is based on Title 28 U. S. Code, Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

This action is brought for a declaration of rights. The petitioners seek this declaration because on February 17, 1957 they were, under collective bargaining agreements, entitled to, and had for years enjoyed, seniority rights on all mechanical jobs in the area known as the South Louisville Roundhouse area. The Collective Bargaining Agreements provided for such seniority rosters in specified geographical areas. The agreements have not been changed.

Petitioners should have filed this suit promptly after they were displaced on February 18, 1957. They followed regular procedure, however, and first applied to the employer, where they were denied any rights. Petitioners, and the other employees on the Roundhouse rosters, desired to continue their employment by the Louisville and Nashville Railroad. Yet, they found that any further work *in the area where they had been working* up through February 17, 1957, was denied to them, but was open to employees on the South Louisville Shops rosters, many of whom had substantially less seniority.

In an effort to settle the differences which had arisen between them and their employer, representatives of the 66 displaced employees suggested that the two groups of rosters be dovetailed. This would have combined the two areas, with no cost to the Railroad. This uniting request was also denied them, with the express approval of the representatives of the unions.

The Roundhouse employees then attempted to procure relief through the National Railroad Adjustment Board by requesting action upon two specific issues, one relating to the right to have the rosters dovetailed and the other a geographical question as to right to deprive the petitioners of seniority standing, when the same work is being done at the same place. The Board decided that the seniority rules of the collective bargaining agreement *provided only for standard point seniority* with no provision for dovetailing of seniority rights. On the other point the Board said there was no merit in the contention that the South Louisville Roundhouse had not in fact been closed, but made no finding on the right to work in the geographical area. This decision did not answer the question submitted as to seniority standing when the same work continued to be done as before in the same places. That question has not been determined by the Board.

The jobs, from and after February 18, 1957, were assigned to employees in the same crafts listed on different rosters. There has been a plain and flagrant discrimination, under the terms of the bargaining contracts against the employees on the Roundhouse rosters. The employees on the Roundhouse rosters have been displaced, and have been refused the right to return to work in the same area, both on February 18, 1957 and each day since that time. These 66 employees are today, and will be tomorrow, entitled, under the provisions of the bargaining agreements, to priority in jobs in the area which was known as the Roundhouse area at the time the collective bar-

gaining agreements were made between the unions and the Louisville and Nashville. They have been deprived of property rights under those agreements. This substituting for men on the Roundhouse rosters (who worked west of the fence) by men from other rosters (who worked east of the fence) was flagrant and arbitrary discrimination by the employer and the respondent unions.

In this action there are questions of discrimination presented as between petitioners on the one hand and both their employer and their respective bargaining agents, on the other hand.

The decision of the Jefferson Circuit Court and of the Kentucky Court of Appeals denied petitioners jurisdiction of this action merely because some of the same parties had been before the National Railroad Adjustment Board. Petitioners insist that the issue of discrimination before the Court in this action has not been heard or determined by that Board, and that that Board would not have had jurisdiction over the present issues.

The issues between petitioners and the respondents are:

1. If, under collective bargaining agreements, a carrier has two adjoining shops areas, each having separate seniority rosters for the four mechanical crafts involved in this action, and the bargaining agreements had no provisions as to uniting or combining shops or work areas, can the carrier and the bargaining agents legally agree to cut off all employees having seniority rights in one shop area, combining

two geographical areas into one shop operation, and continue shop work as before in both parts of the enlarged area using the seniority rosters and the employees for the other area only, thus arbitrarily discriminating against the employees cut off?

2. Does an application to the National Railroad Adjustment Board bar the trial of action for flagrant and arbitrary discrimination, not presented to said Board, of which issues said Board had no jurisdiction?

Petitioners respectfully insist that the carrier and the unions were both parties to the discrimination against them and, that their agreement in advance to the discrimination would have disqualified the members of that Board from hearing the discrimination issues. Petitioners further insist that the Court of Appeals of Kentucky has decided the questions as to jurisdiction of the Court to hear this action different from, and contrary to, applicable decisions by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The provisions of the Kentucky Constitution as to original jurisdiction of circuit courts are Sections 126 and 127. Copies of these sections are included in Appendix B to this petition as Items 1 and 2, respectively. The statute in Kentucky relating to jurisdiction of a circuit court is Section 23.010 Kentucky Revised Statutes. A copy of this section is included in Appendix B as Item 3.

The provision of the United States Constitution involved in this action is the Fourteenth Amendment to the U. S. Constitution, Section 1. A copy of said section is included in Appendix B as Item 4. The statutory provision of the U. S. Code involved in this action is Title 45, Section 153. A copy of parts of said section is included in said Appendix as Item 5.

STATEMENT OF THE CASE.

The facts of this case are simple. They appear in the Complaint-in-Equity, the Amended Complaint and the Exhibits filed with, or referred to, in these two pleadings. No actual pleadings were filed by any of the respondents. The action was decided on two motions to dismiss for lack of jurisdiction. The motion filed by the respondent Unions and its members included other grounds (R. 26, 27). The motion filed by the respondent Railroad Company included an alternative motion for summary judgment (R. 28, 30), with an affidavit with exhibits (R. 31-34).

Only the motions to dismiss for lack of jurisdiction were decided. They were sustained, so that the other motions and the affidavit are not before the Court. The three exhibits filed with the Scholl affidavit marked Exhibits "A", "B" and "C" included the entire record of the submission to the National Railroad Adjustment Board of a complaint by the same 66 employees for whom this action has been filed. In Paragraph 11 of the Amended Complaint in this action petitioners referred to said three exhibits and made them exhibits

with said pleading (R. 42-43). The record of the proceeding before the Adjustment Board is, therefore, a part of the record in this action.

Based on these two pleadings and these exhibits, we will outline the facts and the case as concisely as seems feasible.

Respondent Unions have, since about 1940, been the duly selected bargaining agents for their respective crafts with the respondent Railroad Company (R. 8-9). They negotiated the two collective contracts filed with the complaint in equity in this action as Exhibit "A" and Exhibit "B". Petitioners and the other mechanical employees whom they represent had worked under these agreements for many years, some of them from the time the agreements were first made. During all of the time up through February 17, 1957, they worked in the South Louisville Roundhouse area in pits and along tracks *west of a fence separating this Roundhouse shop area from* a separate area, formerly called the "Back Shop" area, now called *the South Louisville Shop area.* The Roundhouse itself had been torn down in 1956 or before.

In Exhibit "A" the rule as to seniority among the skilled crafts was provided in Rule 29.

This rule, which was in effect on February 17 and 18, 1957, and is still in effect, provided for seniority rosters for each of the four crafts involved in this action at South Louisville Shops and South Louisville Roundhouse. A copy of this rule is included in Ap-

pendix C as Item 1, the rule applicable to Reduction and Restoration of Forces is Rule 26. This provides for seniority governing on reduction of forces and in restoration. A copy of part of Rule 26(a) and part of Rule 26 (g) are included in Appendix C as Item 2 and 3 respectively.

In the agreement as to unskilled employees, Exhibit "B" with Complaint, provisions as to seniority are in Rules 9 and 10. These provide for seniority by districts. Copies of Rule 9(a) and of Rule 10(a) are included in Appendix C as Items 4 and 5. Provision as to force reductions and restorations are in Rule 13 and 14. Rule 13 provides for seniority controlling on reduction. Rule 14 as to recall provides for seniority controlling. Rule 13(a) and Rule 14(c) are included in Appendix C as Items 6 and 7 respectively.

In the record from the Jefferson Circuit Court are two photostatic copies of maps of the Shops areas, showing the long north south fence which separated the older Roundhouse area on the west, from the Back Shop area east of that fence.

Respondents have filed no pleadings, so the record contains no statement as to why in February, 1957 the carrier and the unions chose to make changes in personnel in the westerly shop area. The "Position of Carrier", as given to the Railroad Adjustment Board appears in Exhibit B filed with the Scholl affidavit. This statement includes the following:

> "*Position of Carrier:* Carrier denies that petitioners have been denied their seniority rights.

> Reduction in force was made consistent with the provisions of the applicable agreements and petitioners still retain the seniority rights held by them in the South Louisville roundhouse seniority district."

No change in the bargaining agreement was made then or since. No notice or advice was given either by the carrier or by any of the bargaining agents to any of the 66 employees working in the Roundhouse area, as to the holding of any conference between the carrier and bargaining agents, or as to any assent by the unions to displacement of personnel in the Roundhouse area. The Carrier's Statement of Facts merely says in the pleading it filed with the Adjustment Board:

> "*Carrier's Statement of Facts:* Under date of February 15, 1957, force reduction was made at the South Louisville, Kentucky, Roundhouse under the provisions of Rule 26 of the shopmen's skilled agreement and Rule 13 of the unskilled agreement (International Brotherhood of Firemen and Oilers), with all assigned employes cut off."

The first information which any of the 66 employees working in the Roundhouse area had, as to the Railroad Company's intentions, came on February 4th and 5th, when the Company posted notices as follows (R. 18-19):

"LOUISVILLE & NASHVILLE
RAILROAD CO.

Office of the Master Mechanic
So. Louisville, Ky., February 4th, 1957

BULLETIN No. 39

"TO ALL EMPLOYEES CONCERNED:

"Effective at the close of work of the third shift, February 17, 1957, all Mechanical operations of the South Louisville Roundhouse will be discontinued.

"All Roundhouse forces will be laid off in keeping with Rule 26 of the skilled employes agreement, and Rule 13 of the unskilled employes agreement.

"As a result of the foregoing, the following employes will be cut off in force reduction:

. . . . . .

"Employes laid off by reason of force reduction, desiring to retain seniority rights, should file their address as required under Rule 26(c) of the skilled employes agreement and Rule 14 of the unskilled employes agreement (IB of F&O).

J. A. PARRISH

jap llr"

The statement about force reduction, and about the lay-offs being in keeping with certain provisions, were misleading. Not one single job was discontinued. Immediately after these bulletins were posted, notices were given in the South Louisville Shops offering these exact jobs to the Railroad Company's employees in the same crafts, working under the same bargaining agreements, but listed on the South Louisville Shops rosters. All the jobs were given to men on the Shops rosters on February 18, 1957, if they wanted them.

Naturally the 66 men on the Roundhouse rosters promptly applied to the Unions to protect their rights in seniority in work in the Roundhouse area. The Union officials did nothing to protect the rights of these 66 men. The Unions even consented to saying that a contract which had given to the employees on the Roundhouse rosters seniority rights for almost 15 years, didn't any longer mean what it said—that it meant something different on February 18, 1957 from what it had meant on February 17, 1957.

The bargaining agents would not protest to the Railroad Company, or take any steps for the 66 men on the Roundhouse rosters, *but these 66 employees did*. In these negotiations they suggested the kind of provision which the carrier should have sought—use of both sets of rosters in both areas. When they were denied restoration of their jobs by the carrier, they still tried to work out a solution which would not only unite the areas but combine the rosters. The carrier refused this. Then the 66 displaced employees went to the Railroad Adjustment Board. It held that there was no contract provision as to dovetailing. On the other point, the Adjustment Board made no finding. It really was not in that Board's jurisdiction.

Petitioners and their associates desired to continue to work for the L. & N. Railroad Company. Many of them took work under brand new listing on the Shops rosters. All of them, however, are on the Roundhouse rosters. Under the contract, as it is written and exists today, petitioners and their associates had, and still have, the right to seniority in the

mechanical jobs in the Roundhouse area. That area is geographical. It is expressly designated in the agreements. *These 66 employees had seniority rights therein on February 17, 1957, on February 18, 1957, on February 18, 1960* when this action was filed and on *February 22, 1963* when the Court of Appeals judgment became effective, *and now.*

The Complaint in Equity for Declaration of Rights alleges that the actions of the Railroad Company are in violation of the union contracts, and arbitrarily deprives the 66 employees of their property rights, flagrantly discriminates against all 66 (R. 24). This same pleading alleges that the respondent unions, by failing to aid or represent these 66 employees, have violated the rights of these employees under the Railway Labor Act through the same discriminatory action (R. 24). No excuse for the Unions' acts appear, except that there were about 15 times as many employees in the other Shops. But that is even worse discrimination.

Both the Unions and the other respondents claimed in their motions to dismiss that this action can not be maintained because the Railway Labor Act gave to the National Railroad Adjustment Board, exclusive jurisdiction (p. 27, 28-39). The judgment upholds the plea as to exclusive jurisdiction, and dismisses the action against all respondents. This judgment then has the legal effect of denying a right even to a hearing on the constitutional rights of petitioners and their associates.

REASONS FOR GRANTING THE WRIT.

Respondent, Louisville and Nashville Railroad Company, desired to combine two adjoining shop areas. The same Master Mechanic already had supervision over both. Possibly uniting areas meant economy in management. The collective bargaining agreement called for separate seniority rights. The carrier could have sought an amendment to the contracts. Adjustment of rosters or compensatory arrangements for changes in seniority rights were feasible.

The employees in both Shop areas were represented by the same bargaining agents. Negotiating an amendment, with adjustment so as to continue the employment of all the then employees, ought to have been a most feasible and fair project. Such negotiation only required a definite purpose of fair treatment for both employer and both groups of employees. The men on the Roundhouse rosters were not only not dovetailed into combined rosters; the Roundhouse rosters themselves were pigeonholed.

I. DISCRIMINATION IN EMPLOYMENT BY CARRIER AND BARGAINING AGENTS.

A. Bargaining Agreements Created Contract Rights.

The collective bargaining agreements between the four craft unions and the Railroad Company had been in effect since 1942 or 1943. They created property rights to seniority in specified areas. Up to February 17, 1957 all parties recognized and respected these rights. The Court of Appeals of Kentucky has been

most careful in its protection of such contract rights under collective bargaining agreements. That Court has consistently prevented discrimination.

Gregg v. Starks, 188 Ky. 834, 224 S. W. 459;
Piercy v. L. & N. R. R. Co., 198 Ky. 477, 248 S. W. 1042;
McGregor v. L. & N. R. R. Co., 244 Ky. 696, 51 S. W. 2d 953.

A case decided by the Kentucky Court of Appeals in 1951, Hill v. U. P. Workers Union of America, 314 Ky. 791, 236 S. W. 2d 887, reaffirms this principle in these words (p. 798):

> "the union is the agent and servant of its members and membership does not exist for the benefit of the union;"

The Hill opinion states further as to the limitation upon the union's authority (p. 799):

> "Even within its own body, a trade union can employ no power as a means of oppression and injustice in respect of its members or deprive any of them in the form of contractual surrender or otherwise of their fundamental rights when the public interest will not be thereby served. Such assumed power cannot deprive any one of his constitutional right of liberty and property. Cameron v. International Alliance, etc., 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594. * * * *The right to earn a living property within the concept of constitutional rights, and a trade union* in the service of its own interests *may not deprive a person of such constitutional rights.* DeMille v.

American Federation of Radio Artists, 31 Cal. 2d 139, 187 P. 2d 769, 175 A.L.R. 382, certiorari denied, 333 U. S. 876, 68 S. Ct. 906, 92 L. Ed. 1152." (Italics supplied.)

Congress has provided for consolidation of railroads, a much greater physical and managerial alteration of facilities, but the Act of Congress authorizing such consolidations, Title 49, Section 5, par. 2 (c) requires the Interstate Commerce Commission to give weight to specific ideas, including "the interest of the carrier employees affected."

In United States, et al v. Lowden, et al., 308 U. S. 225, 60 S. Ct. 248, 84 L. Ed. 208 this Court held that the Interstate Commerce Commission in dealing with the lease of one railroad to another, in order to unite the facilities of the two railroads then in reorganization, the Commission could impose conditions regarding the employees affected.

In Interstate Commerce Commission v. Railway L. E. Association, 315 U. S. 373, 62 S. Ct. 717, 86 L. Ed. 904 this Court held that the same principle applied to the protection of affected employees in cases of abandonment of rail lines as well as in the cases of uniting railway lines.

In the case of Brotherhood of Maintenance of Way Employees, et al v. United States, 366 U. S. 169, 81 S. Ct. 913, 6 L. Ed. 2d 210 this Court held that the statute as to merger of lines requiring that employees for four years, not be placed in worse position, required that the employees be compensated, if not re-

tained in employment. Congress has given a great deal of study and attention to the protection of employees in cases of mergers or abandonment of railroads as being in the public interest. Where contracts exist, legislation should not be needed.

B. Procedure Followed in This Case.

The respondent, Louisville and Nashville Railroad Company, had used the two mechanical shops in its South Louisville Yards for over half a century. In January, 1957 the carrier wished to change this arrangement by combining the operation of the two mechanical shops. Such negotiations only required a recognition by all parties of existing rights and duties, and a willingness on the part of all concerned, for fair treatment to all.

What did happen to the seniority rights of the employees listed on the Roundhouse rosters in the South Louisville Yards? All were permanently displaced.

These sixty-six displaced persons, however still assert their seniority rights. In this action they ask for an adjudication that the union representatives who failed to take their part and the Carrier have all flagrantly and arbitrarily discriminated against each of these sixty-six men.

C. Rights of Action for Discrimination Under Bargaining Contracts.

1. JURISDICTION OF THE JEFFERSON CIRCUIT COURT.

On January 1, 1957 respondent Railroad Company complied with the provisions of the bargaining agreements in its mechanical shops at Louisville, Kentucky. It posted rosters in its various shop areas including the South Lonisville Roundhouse rosters. All sixty-six of the employees for whom this action has been filed, were named on those rosters. The rosters were still in effect and operated on January 28, 1957, but the Railroad Company had decided to unite the Roundhouse Shop and the South Louisville Shop for future operations.

As heretofore indicated, respondent could have negotiated with the men on the Roundhouse rosters, through their designated representatives, for the adjustment of rights on the uniting of the shops. This would naturally have required an amendment to each of the bargaining contracts to take care of such a situation. Of course this would not have been necessary, except for the designation of geographical areas for the seniority rights. Respondent Carrier in fact made no effort to negotiate for any amendment. It decided upon a course to follow in uniting the shops, which ignored the contract and required that some action be taken with reference to future assignment of jobs. The Carrier could have assigned the jobs to either of the shops areas or have agreed to combine the seniority rosters upon some basis agreeable between it and the employees by actual contract amendment.

The decision of the Carrier was to use the rosters for the South Louisville Shops. This caused the men on the Roundhouse rosters to be displaced immediately by other personnel and to lose all the seniority rights which they had accumulated and all benefits in the future of any accumulated seniority. They only have a right to jobs, if and when available.

The Carrier chose to violate the contracts, rather than to try to procure amendments thereto through normal procedure. The representatives of the unions, for some reason, sacrificed the seniority rights of the mechanical employees in the shop area having the smaller number of employees.

The Railway Labor Act recognizes the need or desire for alterations in bargaining agreements and provides for procedure between the unions and the carrier to work out such changes. Here the Carrier chose not to negotiate; it made its own decision on contract rights. That forced the employees to seek, in court, a declaration of rights as to who were thereafter entitled to the jobs in the Roundhouse area under the provisions of the bargaining agreement.

They need this declaration now just as they have ever since February 18, 1957. They have filed this action in a court of general jurisdiction to procure such declaration. The Rules of Procedure applicable in the Jefferson Circuit Court authorize it to hold hearings and make such declarations. That is what petitioners in this action are asking. As a matter of fact Kentucky Courts have, as previously mentioned, carefully protected the rights of employees de-

pending upon bargaining contracts. The Kentucky Courts have held specifically that in interpreting such agreements they will give such meaning as the parties themselves have given to it in operating or acting under it.

Piercy v. L. & N. R. R. Co., 198 Ky. 477, 248 S. W. 1042;

L. & N. R. R. Co. v. Bryant, 263 Ky. 578, 92 S. W. 2d 749.

In the Bryant case the Court says that the rules of practical construction by the parties, is particularly applicable to such agreements and that the Court was constrained to give controlling effect to this construction which had also been recognized by the lower Court.

Here the Carrier has wilfully violated its contracts with petitioners. It planned and secretly advised the union representatives of the "details of the force reduction". This so-called force reduction constituted a flagrant and arbitrary discrimination against these sixty-six displaced employees. The Jefferson Circuit Court has jurisdiction to determine the rights of the parties for violation of the contract and for flagrant and arbitrary discrimination. The Court did exercise such authority in the cases of:

Gregg v. Starks, 188 Ky. 834, 224 S. W. 459;

Piercy v. L. & N. R. R. Co., 198 Ky. 477, 248 S. W. 1042;

L. & N. v. Bryant, 263 Ky. 578, 92 S. W. 2d 749;

Hill v. U. P. Workers Union of America, 314 Ky. 791, 236 S. W. 2d 887.

2. THIS COURT'S DECISIONS HAVE PREVENTED JUST SUCH DISCRIMINATION.

In the January 28, 1957 conference between the carrier and the bargaining representatives, there apparently were no negotiations as to future job rights, due to the change in operating plans desired by the carrier. It ignored the employees on the Roundhouse rosters, in altering working conditions by displacing these employees. Negotiations for contract changes would have presented a major dispute relating to future working conditions.

Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886;

Brotherhood of Loc. Eng. v. Baltimore & Ohio R. Co., 83 S. Ct. 691, decided March 4, 1963.

The Burley opinion distinguishes such major disputes as those to provide for prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions, from minor disputes arising from grievances from past operation. The Opinion says in part (p. 723):

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past."

No contract change has been made, however. The representatives of the unions failed to give any kind of representation to this group who were being permanently displaced. In good conscience these bargaining representatives should certainly have notified the men listed on those rosters, even if these bargaining representatives did not choose to try to protect the accrued seniority of these employees.

The carrier chose to make its own unilateral decision on the contract rights, with an arbitrary change as to interpretation of the contract. Even though it supposedly had secret approval thereof by the bargaining agents, the employees affected were entitled to some advice before bulletins were posted of action to deprive them of their property rights and to force them to seek some remedy in Court. Certainly the carrier and the union representatives have been guilty of flagrant discrimination against the petitioners and those they represent. The carrier without any notice to them bulletined complete lay offs and then complete displacement. The carrier and the unions gave to a contract one interpretation on February 17, 1957, and an entirely different interpretation the following day. This complete displacement of personnel having seniority in the designated area, with permanent loss by the employees displaced, of all their seniority rights in that area, was a severe blow to orderly railway operation.

In Hill v. U. P. Workers of America, et al., 314 Ky. 791, 236 S. W. 2d 887, which was a case with a controversy as to which union represented the em-

ployees, the following statement of law was made with reference to the authority of the union as a representative of the employees, (p. 798):

> "But the union may not act in any particular way so as to affect injuriously the personal rights of its members. A member does not have to submit to the determination of the union in any question involving his personal rights."

The unions realized that they had no authority to alter the bargaining agreements to affect seniority rights. They have never in this action stated their positions, but they were not authorized to surrender any accrued seniority rights. No one has claimed that they affirmatively did so. They only stood silent, or absented themselves, when the rights of these 66 displaced employees were involved.

However, their position of nonaction amounts to giving priority in job rights to other employees over the 66 having seniority by specific contract provisions.

The present action is one brought for a declaration of rights, where discrimination is charged both against the bargaining agents and the carrier. The decisions of this Court have in numerous cases held that discrimination against certain employees or classes of employees invalidates agreements or understandings between carriers and bargaining agents.

Steele v. L. & N. R. R. Co., et al., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 133;

Tunstall v. Brotherhood, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187;

Graham, et al., v. Brotherhood of Locomotive F. & E., 338 U. S. 323, 70 S. Ct. 14;

Conley, et al., v. Gibson, et al., 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80.

The Steele case involved discrimination against negro firemen on the L. & N. In 1940 the Brotherhood without informing the negro firemen or giving them an opportunity to be heard, gave notice to several railroads that the Brotherhood desire to amend the existing bargaining agreement. It did make two such agreements with the L. & N. in 1941. Then on April 8, 1941 all jobs in the pool in which Steele worked were declared vacant, and he was replaced by white firemen, junior to him, while he was given more arduous work. The Railroad Company was made a party, but the complaint sought a declaration of rights against the Brotherhood and an injunction so long as the discrimination continued.

The Supreme Court of Alabama held that the complaint stated no cause of action. This Court recognized that the contract changes discriminatorily restricted the negro firemen, and if the bargaining agents could make such contracts, Steele's constitutional rights would be involved. This Court then met the question of discriminatory contracts squarely and held that:

1. The Brotherhood, as statutory representative of the craft, had the exacting duty of protecting equally all those for whom it acts;

2. Congress did not undertake to authorize the bargaining representative to make discriminations.

3. The bargaining representative and its members may be enjoined from taking benefits of such discriminatory action.

4. Neither is the Railroad entitled to take the benefit of such prohibited contract.

The opinion then points out that the Railway Labor Act makes no reference to disputes between employees and their bargaining representative, and that the Adjustment Board could not give the entire relief sought here. Then the Opinion says (p. 207):

> "In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which Courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction."
>
> * * * * * * *
>
> "We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty."

On the same day this Court also decided the case of Tunstall v. Brotherhood, etc., 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187. This action had been filed in a U. S. District Court case in Virginia, against the Railway

Company, the Brotherhood and others, for a declaratory judgment alleging discrimination against a negro fireman. The District Court dismissed for want of jurisdiction, and the Court of Appeals affirmed. This Court held that Tunstall was without adequate administrative remedies, and could resort to a court of equity for relief without attempting to secure administrative relief. This Court held that the complaint stated a cause of action and reversed the decision. This evidently involved the Railway Company as well as the Brotherhood.

In the case of Rolax v. Atlantic Coast Line Company, 186 F. 2d 473 (C.A. 4), the suit was against the Railroad Company, the Brotherhood and others to have declared void an agreement depriving Rolax and other negro firemen of seniority rights and other relief. The case was based on the facts and holdings by that Court in Board of Locomotive Firemen and Enginemen v. Tunstall, 163 F. 2d 289 (C. A. 4). The Rolax opinion discusses that Tunstall opinion at length and reversed the District Court's order of dismissal.

The opinion holds the amended bargaining agreement of February 18, 1941 discriminatory and void. Most of the opinion deals with Brotherhood action, but the Railroad Company insisted that the claim for damages against it be dismissed. The opinion says on that point (pp. 480-1):

> "As a result of the agreement of February 18, 1941, which we hold to be discriminatory and void, the railroad company has failed to accord to certain of the Negro firemen the seniority rights to which they are entitled and must respond in dam-

ages on that account. The void and discriminatory agreement which it entered into with the Brotherhood will no more protect it than it will protect the Brotherhood from liability for the loss occasioned to those who were injured thereby."

In the case of Graham, et al v. Brotherhood of Locomotive Firemen and Engineers, 338 U. S. 232, 70 S. Ct. 14, 94 L. Ed. 22, twenty one negro firemen sued 2 lodges of the Brotherhood, three railroads and certain officers of the lodges. This Court held that the cause of action pleaded was substantially the same as that in the Steele and Tunstall cases.

The Opinion holds that the exclusive statutory representative of an entire craft cannot bargain for the denial of equal employment and promotion opportunities to a part of the craft upon ground of race. It pointed out that the exclusive representation strips the minorities of all power of self protection and that, by abuse of its powers by perpetrating discriminatory employment practices, gives rise to a cause of action under federal law which federal Courts will entertain and will remedy by injunction.

The case of Teague v. Board of Locomotive Firemen and Enginemen, 127 F. 2d 56 (C. A. 6) was one where Teague, a Negro had been a fireman on the Gulf, Mobile and Northern Railway Company since March 15, 1917. He claimed that secret agreement had been made in 1938 between the Brotherhood and the Railroad Company, which gave preference to members of the Brotherhood (all white), and affected his seniority rights. He brought a bill in the U. S. Dis-

trict Court in Tennessee, alleging impairment of seniority rights by an unlawful agreement.

The Teague opinion says that the basic question was whether or not the Railway Labor Act conferred power on representatives to make a collective bargaining agreement destructive of vested rights of minority workers.

Teague tried the National Railroad Adjustment Board, but his claim was rejected "based on lack of jurisdiction". He based his claim in the U. S. Court on the bargaining agent acting under the Railway Labor Act. The opinion says that "there is nothing in the Railway Labor Act which authorizes their representatives to impair the personal or property rights of the employees." Unfortunately the above cases had not been decided, and the Court of Appeals decided that it had no jurisdiction. But the opinion says (p. 56):

> "If the allegations of the complaint are true, the appellant has a grievance, and one that is substantial and not merely colorable and fanciful. Somewhere must reside jurisdictional power to adjudicate it, and grant him and others of his class adequate relief. It is not within our province to say how or where. We have but to point out that he has mistakenly selected his forum. . . ."

The case of Conley, et al v. Gibson, et al., 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 contains facts very similar to the facts in the instant case, except that, as in most of the other cases involving discrimination, the plaintiffs were negroes. The Railroad with the blessing of the Unions purported to abolish 45 jobs

held by the Negro plaintiffs, which jobs were not abolished in fact but were filled by white men except in a few instances where several of the Negroes got their jobs back at a loss in seniority. This was done without alteration in the existing collective bargaining agreement.

The U. S. Court, for the Southern District of Texas supported by the Court of Appeals, for the Fifth Circuit, was of the opinion that, despite the ruling in the Steele case, and because the Conley situation involved the interpretation of the collective bargaining agreement, the Railway Labor Act, 45 U. S. C. A. 153 First (i), conferred exclusive jurisdiction of the matter in the National Railway Adjustment Board. This Court reversed the lower Courts, pointing out that the gist of the action was a discrimination claim between a group of employees and their bargaining agent over which the N.R.A.B. had no jurisdiction.

The L. & N. mechanical employees who worked for so many years in and around the South Louisville Roundhouse are equally as deserving of protection against arbitrary discrimination as colored firemen.

These decisions, including ones from this Court, show that the discrimination procured through unauthorized acts of the bargaining agents are void as to all affected parties. That is why the carriers have been included as parties in these actions. It is particularly applicable in this case, as the carrier initiated the contract violation and actively caused the discrimination. The Jefferson Circuit Court does not have any limitation of jurisdiction as the Court thought it had in the Teague case.

II. DOES APPLICATION TO NATIONAL RAILROAD ADJUSTMENT BOARD BAR COURT ACTION ON DISCRIMINATION?

We must divide the discussion of this subject immediately. The provisions as to the Adjustment Board relate solely to matters between the carrier and the carrier's employees.

A. Adjustment Board Has No Jurisdiction Over Union-Membership Controversies

The National Railroad Adjustment Act has no bearing whatever upon relationship between the respondent associations and brotherhoods and their members. Primarily the Act is intended to be for matters pending between the unions and the carrier. In this particular case both the carrier and the unions have aligned themselves against the petitioners. The respondent unions have attempted in this case to claim that consideration of the questions involved here with awards made, whether on the point involving issues in this action or not, operate as a bar to claims against the union.

There is no justification whatever for any such idea. The cases which this Court has determined with reference to the discrimination of the bargaining representatives against members of the craft or crafts which they represent, have pointed out the fact that the Adjustment Board does not in any way determine matters between the unions and the craft workers.

This absence of jurisdiction in the Adjustment Board as to any dispute between the employees and

their representative is directly pointed out in 323 U. S. 205 in the opinion in the case of Steele v. L. & N. R. R. Co., et al., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 133 and Tunstall v. Brotherhood, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187.

In the case of Conley v. Gibson, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 this Court said on pages 44-45:

> "The Adjustment Board has no power under Section 3 First (i) or any other provision of the Act to protect them from such discrimination."

This statement refers to the unfair discrimination by the bargaining agent against particular employees discussed in that opinion.

B. Jurisdiction of Adjustment Board Limited.

The only point which either the Jefferson Circuit Court or the Kentucky Court of Appeals considered with reference to this Act was the fact that respondents claimed that the controversy had been before the National Railroad Adjustment Board. That necessitates an approach to this subject by considering the statutory section which supposedly contaminates claimants and eliminates their otherwise valid causes of action. The particular Section is Title 45, Section 153, (m). It reads in part as follows:

> "A copy of the award shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."

This language is plain enough. The finality provided relates to the award hence it is proper in this case to discuss the questions presented and the awards made.

Before and after they were laid off and displaced, the sixty-six mechanical employees on the Roundhouse rosters negotiated with the employer as to their rights. They asserted their claims to seniority in the Roundhouse area on an exclusive basis, but they made an approach for solution of the problem by making a most practical suggestion. As the South Louisville Shops employees were to be given all the jobs in both the specified areas, the petitioners or their representatives suggested to the carrier's representatives that the rosters be dovetailed so that all employees on all rosters could retain their seniority. Why this did not appeal to the carrier we do not know. Upon the failure to procure even this adjustment in the settlement of the controversy, the sixty-six employees filed a Complaint with the National Railroad Adjustment Board submitting the following questions:

> "(a) Under the respective agreements in force, can the Carrier deprive petitioners of their seniority standing under the pretext of discontinuing jobs and reducing force, when the same work is being done as before and in the same places?
>
> "(b) Are not petitioners entitled to be dovetailed in seniority with other employees of the South Louisville Shops, if their work continues to be assigned to said Shops?"

We do not think that the Adjustment Board had jurisdiction to decide either one of these questions. In the first place they related to future operations, not to a dispute over past conduct, and they related to the entire group of employees on the Roundhouse rosters as well as the employees on the South Louisville Shops rosters. The result of the submission to the Railway Adjustment Board demonstrates the point which we make. For some reason the Adjustment Board decided that it had jurisdiction in the case. This is directly contrary to what they decided in regard to the controversies which were brought before the Court of Appeals for the Sixth Circuit in Teague v. Locomotive Firemen and Enginemen, 127 F. 2d 56 (C. A. 6).

After assuming jurisdiction the Railway Adjustment Board made one decision and one finding of fact. It found that the seniority rule in the collective bargaining agreements provided only for standard point seniority. The finding was absolutely correct. The question of dovetailing was never claimed to have been included in the contract. The idea as to dovetailing was intended as a helpful suggestion toward solving an awkward situation which the carrier had created. The decision that the contract included only standard point seniority can be final and binding. That helps prove the basis for the discrimination made against petitioners.

The only other fact which the Adjustment Board seems to have actually determined is that they "find no merit in the contention of the complainants that the South Louisville Roundhouse was not in fact closed

or in the contention that the closing . . . was in bad faith or subterfuge.". As the geographical area was the basis for seniority, question (a) has not been answered; there is nothing final in that on the question of petitioners' seniority or of discrimination.

Even transfer of work to another point would not be a legal method of discarding the Roundhouse rosters. There are numerous cases where such transfers of work have been held to carry with it the transfer of seniority rights of the employees. On this point, the same principles would apply to railroad employees as to other crafts working under bargaining agreements.

> Metal Polishers, Buffers, Plasterers & Helpers Int. Union, Local 44 A.F.L.-C.I.O. v. Viking Equipment Co., 278 F. 2d 142 (C. A. 3);
> Zdanok v. Glidden Co., 228 F. 2d 99 (C. A. 2).

The Adjustment Board did not answer question (a) submitted to it. There certainly can be nothing final and binding about an unanswered question.

This question as to seniority in that geographical area related to the future operation of the Railroad Company's shops. It was not a dispute as to some past conduct. It related to the working conditions in the future day to day operation of the Railroad Company's shops. The Railroad Adjustment Board had no jurisdiction to consider this question, and their method of handling it demonstrates the fact that it did not belong in the jurisdiction of that Board.

The Railroad Company is very persistent in its attempt to prevent any court from considering the

question of discrimination. Discrimination was not the issue presented to the Board in question (a) and the Board has made no findings as to discrimination. This was not within its valid governmental jurisdiction.

The Opinion in the Steele case points out squarely that in a matter on which the unions and the carrier already agree, the Railway Labor Act does not furnish any administrative remedy.

The Opinion in Tunstall v. Brotherhood, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187 says as to the situation where the bargaining representative and the carrier have made an agreement which is discriminatory as to certain employees covered by the contract (p. 213):

> "[1] For the reasons stated in our opinion in the Steele case the Railway Act itself does not exclude the petitioner's cause of action from the consideration of the federal courts."

The right to a judicial review in cases where a minority in a union is not represented by a union has been recognized not only in the Steele, Tunstall and numerous other cases in this Court and in the other Federal Courts, but the same principles are recognized in the Court of Appeals for the Second Circuit in Rychlick v. Pennsylvania R. R. Co., 229 F. 2d 171 and in the Court of Appeals for the District of Columbia in Edwards v. Capital Air lines, et al., 176 F. 2d 755.

In this case the principles announced in the Steele case are applicable because no question arising out of

this discrimination really belonged within the jurisdiction of the Adjustment Board and the present question as to the right today or tomorrow as to seniority in the Roundhouse shops area is still a subject requiring Court determination. We believe that the decisions by this Court in the cases cited above on the question of discrimination likewise determine the right of the petitioners herein and those they represent to have a judicial declaration of rights in regard to the bargaining agreements which were in effect on February 18, 1957 and remain to this day with no changes therein. Petitioners and their associates lived with a sense of security in their seniority rights up to about February 17, 1957.

CONCLUSION.

Petitioners have failed to get a day in Court on their claim of flagrant and arbitrary discrimination as to job rights. For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May 20, 1963.